No. 12733

United States Court of Appeals

For the Ninth Circuit

ADOLPH W. ENGSTROM, Trustee in Bankruptcy for Northwest Chemurgy Cooperative, a corporation, Bankrupt,

Appellant,

vs.

R. M. WILEY,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

Brief of Appellee

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BRIEF OF APPELLEE

STATEMENT OF THE CASE

The appellant's statement of the case is factually correct; however, appellee does controvert and deny that the agreed statement of facts establishes anything other than that the transaction as between the parties was a cash transaction.

SUMMARY OF ARGUMENT

Appellee Contends:

I.

To determine that a payment of money by an insolvent corporation, (within the four-month period preceding the filing of the petition in bankruptcy), is a preference within the meaning of the Washington statutes, the court must first find that the payment was on a pre-existing debt incurred prior to the

beginning of the four-month period and not paid as a condition precedent to acquiring title to property of equal value.

II.

The transaction here involved was a cash sale of wheat on January 27, 1947, appellee receiving from appellant a check in payment of the purchase price (Transcript, 29) and Account Sales marked paid on that date (Transcript, 30).

III.

That the check given appellee by appellant on January 27, 1947, constituted only conditional payment, and title to the wheat did not pass as between the parties until February 7, 1947, on which date the check was paid by drawee bank.

That had the check given appellee by appellant not been paid when presented on February 7, 1947, appellee would have been entitled to rescind the transaction and reclaim his wheat.

ARGUMENT

I.

To determine that a payment of money by an insolvent corporation (within the four-month period preceding the filing of the petition in bankruptcy) is a preference within the meaning of the Washington Statutes, the court must first find that the payment was on a pre-existing debt incurred prior to the beginning of the four-month period and not paid as a condition precedent to acquiring title to property of equal value.

The argument set forth in appellant's brief is predicated entirely on the false assumption that the

transaction between the parties on January 27, 1947, was a sale on credit and that title unconditionally passed, as between the parties, on the date appellee delivered the wheat to appellant and accepted from appellant a check in payment.

After careful study of all the authorities and cases cited by appellant's counsel, we have been unable to find even one in point. Without exception the decisions pertain to payments made on pre-existing debts.

In the interest of brevity, we will refrain from further comment on appellant's argument.

* * * * *

The third element of a "preference" is that the creditor's claim must have been a pre-existing debt. In *Remington on Bankruptcy (4th Ed.)* § 1694, the author states:

> " * * and the transfer will not amount to a preference if made contemporaneously with (or before) the rising of the claim. Preference implies preceding credit."

In § 1674 the author further states:

> "Where a seller has the right to rescind the sale and recover the goods, such right being predicated upon the failure of the title to pass for lack of meeting of minds, a return of such goods will not constitute a preference; for the seller thereby is declared never to have parted with his ownership, nor have become a creditor for the goods, and the title to them is not in the bankrupt."

and in § 1695 states:

> "Cash transactions, not preferences. Abso-

lute simultaniety is not requisite, if the title is not meant to pass until the payment is actually made."

II.

The transaction here involved was a cash sale of wheat on January 27, 1947, Appellee receiving from Appellant a check in payment of the purchase price (Transcript, 29) and account sales marked paid on that date (Transcript, 30).

The record clearly shows that on January 27, 1947, appellee delivered to appellant wheat having a market value of $2,252.78 and accepted appellant's check in that amount for the purchase price. (Transcript, 12.)

There is not even an inference in the record that the parties, or either of them, ever considered the transaction as anything other than a cash transaction.

The District Court found that the appellant (plaintiff) failed to sustain the burden of proving that the transaction constituted an unlawful preference and was other than a *cash* transaction (Transcript, 21), and concluded, as a matter of law, that the transaction was in substance and effect a *cash transaction* and there was no intent on the part of either party to create a debtor - creditor relationship. (Transcript, 22.)

Courts must of necessity determine the character of a transaction by the circumstances of the case, and where the circumstances indicate that a given transaction amounts to a *cash sale*, it should be

treated as such.

It is a matter of common knowledge that at no time during the past five years has any wheat farmer been obliged to extend credit in order to dispose of his wheat at the market price, and it must be conceded that this transaction was at the market price, there being nothing in the record and no contention made by appellant to the contrary.

There is not even an inference in the record that appellee ever intended or agreed to extend any credit or terms to appellant; to hold the check for any given period; or to transfer any title in the wheat to appellant, other than conditionally subject to the payment of the check when presented to the drawee bank.

III.

That the check given Appellee by Appellant on January 27, 1947, constituted only conditional payment, and title to the wheat did not pass as between the parties until February 7, 1947, on which date the check was paid by drawee bank.

That had the check given Appellee by Appellant not been paid when presented on February 7, 1947, Appellee would have been entitled to rescind the transaction and reclaim his wheat.

The courts are in accord that where a check, or its equivalent, is given in payment of the purchase price in a cash transaction, and especially when the use of checks is the accepted method of consummating such cash transactions, the check constitutes only conditional payment, and until the check is paid, the title, as between the parties, passes only conditionally;

and, upon dishonor of the check, the seller may rescind the transaction and reclaim that with which he has parted.

One of the leading cases on this point is the case of *Standard Investment Co. vs. Town of Snow Hill, N. C.*, 78 Fed. (2d) 33. Briefly, the facts were that Standard Investment Co. filed suit again the Town of Snow Hill and the receiver of the failed National Bank of Snow Hill. N. C. to recover certain bonds pledged by the bank as security for the deposit of the town, or in lieu, to have a preferred claim for the amount of the bonds against the assets of the bank. Plaintiff's agent had accepted a check from the bank in payment for the bonds at time of delivery. The bank immediately delivered the bonds to the mayor of the Town of Snow Hill as security for the town's deposit in the bank. The check issued by the bank was drawn on a foreign bank and when plaintiff presented check for payment, drawee bank refused because the Bank of Snow Hill had closed the day the check was presented. In its decision the court held that Standard Investment Co. was entitled to recover from the Town of Snow Hill and in the opinion stated as follows:

> "There can be no question, we think, but that the title of the bank was defective. The sale was a cash transaction, in which the passage of title depended upon payment; and it is well settled that, in the absence of special agreement to the contrary, a check is conditional payment only

> and does not operate to effect payment unless it is itself paid. The rule that a check of a debtor is merely conditional payment applies to obligations arising out of debts; and, where there is a sale for cash on delivery and payment is made by check of the buyer, such check constitutes only conditional payment. Until the check is itself paid, the title, as between the parties, passes only conditionally; and upon dishonor of the check, the seller may rescind the transaction and reclaim that with which he has parted."

This principle has been followed and adopted by the Supreme Court of the State of Washington. In the case of *Quality Shingle Co. vs. Old Oregon Lumber & Shingle Co.*, 110 Wash. 60; 187 Pac. 705, the facts were that plaintiff owned a carload of shingles which it delivered to the Great Northern Railway Co. in the State of Washington for shipment to Whitefish, Montana. The Railway Company delivered to plaintiff a straight non-negotiable bill of lading, wherein plaintiff was named both as consignor and as consignee. Plaintiff subsequently sold the carload of shingles to Shepard-Traill Co. on the basis of the purchase price being paid upon delivery of the bill of lading. Plaintiff thereupon delivered the bill of lading, endorsed in blank to Shepard-Traill Co. and received that company's check for the amount of the agreed purchase price. Plaintiff presented the check to drawee bank in due course and payment was refused. In the meantime, Shepard-Traill had sold the carload of shingles to Old Oregon Lumber &

Shingle Co. for value and delivered to said company the bill of lading endorsed in blank.

In ruling that the plaintiff was entitled to recover the amount of the purchase price from the Old Oregon Lumber & Shingle Co. the court in its opinion, at *page 64*, stated:

> "It seems to us to follow, in the light of elementary rules of law, that, as between respondent and Shephard-Traill Co., the title to the shingles did not pass from respondent (Quality Shingle Co.) to Shepard-Traill Co. upon it receiving the bill of lading for the shingles and giving its check to respondent therefor. The real question in this case is whether or not respondent retained such equitable right in the shingles that it may successfully assert such right as against appellant (Old Oregon Lumber & Shingle Co.), the purchaser of the shingles from Shepard-Traill."

The court concluded that Quality Shingle Co. had the same right to the shingles as against appellant as it had as against Shepard-Traill Co., because it was an interstate commerce shipment.

In the case of *In re Perpall*, 256 Fed. 758, the facts were briefly that the seller delivered a bond by messenger to a stock broker as a cash sale. The messenger left the bond with the purchasing broker, as was the business custom, to permit the broker to make necessary book entries, prepare check for payment, etc. Another messenger called at the broker's office, later the same day, and picked up the check in payment of the purchase price for the bond. Later, the

same day, an involuntary petition in bankruptcy was filed against the stock broker and upon seller presenting check to drawee bank for payment, payment was refused. In deciding that the seller was entitled to recover the bond or its value, the court stated as follows:

> "In the case of Empire State Type Founding Co. vs. Grant, 114 N. Y. 40, 21 N. E. 40, it was held that, where a contract for the sale of personal property does not provide, in express terms, that payment shall be made on delivery, or that payment and delivery shall not be concurrent, the intent of the parties must control, and if from the acts of parties and the surrounding circumstances it can be inferred that it was intended that payment and delivery should be concurrent acts, the title will be deemed to have remained in the vendor until the condition of payment is complied with. The court in that case also concluded that the question of intent in such case is one of fact.
>
> "Upon the facts now under consideration, the referee, before whom the testimony was taken, has found that the sale of the bond in question was for cash or the equivalent of cash upon delivery; in other words, it has been resolved as a question of fact that before title to the bond should pass to the bankrupt there was the necessity of the performance by him of the condition precedent to payment. We believe this finding of the referee to be entirely justified by the evidence."

Later, in *In re Perpall*, 271 Fed. 466, in which case the facts were very similar to those in the above cited case involving the same bankrupt, the check given by the bankrupt in payment of the purchase

price of securities on a cash sale was paid by the drawee bank when presented. The action was brought by the trustee to recover the amount paid on the check as a preference. The court held that title in such a transaction did not pass until the check was paid and denied the trustee was entitled to recover. In the decision the court cited *In re Perpall*, 256 Fed. 219, as an authority.

The two decisions in the *Perpall Cases* are later cited as authoritative in the case of *Hough vs. Atchison, T. & S. F. Ry. Co.*, 34 Fed. (2d) 238.

In the case of *Manly vs. Ohio Shoe Co.*, 25 Fed. (2d) 384, the court held that where a bankrupt secures possession of goods by giving a worthless check, the recovery of the goods does not constitute a preference.

Again in the case of *Marion Machine Foundry & Supply Co. vs. Giraud*, 285 Fed. 160, in which case the petitioner sold the bankrupt merchandise (rig irons) and accepted a check in payment; the drawee bank refused payment when presented; three days later the petition filed in bankruptcy; and the merchandise subsequently sold by the receiver; the court held:

> "It is not necessary to show actual fraud. It is sufficient if in equity and good conscience the proceeds of the sale of the rig irons ought to be paid over to the petitioner. The case is not affected by the fact that petitioner accepted a check which was not paid."

In the above case, *In re Perpall*, 256 Fed. 758, was again cited as an authority.

CONCLUSION

For the sake of brevity we have refrained from citing the numerous decisions and references set forth in the authorities and cases herein cited.

We feel justified in contending that the question here before the court has been so definitely settled, for such a long period of time, that to contend to the contrary is to no avail.

If the law pertaining to such transactions was as contended by appellant, it would be virtually impossible to transact business with corporations in the usual and accepted manner. To contend that a seller cannot consummate a *cash transaction* if he accepts a check in payment for his goods *unless he cashes the check at the buyer's bank the same day he delivers the goods;* or to contend that a seller who accepts a check in payment on delivery of goods, and presents the same and receives payment from the drawee bank within a reasonable time after the transaction occurs, has extended credit to the buyer under the intent and meaning of the Federal bankruptcy laws, or the statutes of the State of Washington, appear to us to be contentions which are totally unsupported by any rule of law, equity or common sense.

The very statute (Rem. Rev. Stat. of the State of Washington, § 5831) upon which the appellant relies

was enacted to clarify the question of what payments received by creditors of a corporation on pre-existing debts were preferences, without the receiver or trustee carrying the burden of any proof as to insolvency, and the legislature never intended, by enacting said statute, in any way to change or modify the well established principles of law pertaining to cash transactions.

In the case at bar the bankrupt corporation did not acquire title to appellee's wheat until February 7, 1947, on which date appellee received payment of the purchase price from appellant's bank. The payment of appellant's check by the drawee bank on February 7, 1947, did not diminish the assets of the bankrupt, as the bankrupt at that time acquired title to the appellee's wheat, which was of equal or greater value than the amount paid on the check. Such is not a preference.

Appellee submits that the judgment of the District Court should be affirmed.

Respectfully submitted,

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